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916935—50

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 367

OTIS MASON MARTIN, CLAIMANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 30–35) is reported at 183 F. 2d 436.

JURISDICTION

The judgment of the Court of Appeals was entered July 24, 1950 (R. 35), and a petition for rehearing (R. 37–47) was denied September 6, 1950 (R. 48). The petition for a writ of certiorari was filed October 17, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether evidence leading to the forfeiture of an automobile was obtained by an unreasonable seizure under the following circumstances: (1) The officer making the seizure was a probation officer charged with supervision of the petitioner and entitled to arrest him without a warrant; (2) upon the basis of matters seen and heard by him, the officer believed petitioner to be engaged in illicit liquor activities in his garage immediately before he entered; (3) the officer entered the garage while petitioner was present, without permission and without an arrest or a search warrant; (4) the officer observed illicit liquor in the car and on the floor of the garage; (5) the officer obtained petitioner's assent to appear in court the next morning; and (6) the officer seized the automobile and the illicit liquor.

STATUTE INVOLVED

The construction and application of §§ 3321 and 3720 of the Internal Revenue Code (26 U. S. C. 3321, 3720), under which the forfeiture was effected, are not in issue.

18 U. S. C. (Supp. III) 3653 provides in pertinent part as follows:

> At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant.

STATEMENT

This is an action under §§ 3321 and 3720 of the Internal Revenue Code (26 U. S. C. 3321, 3720) for the forfeiture of petitioner's 1940 Ford coupe on the ground that on January 20, 1950, it had been used with intent to defraud the United States, in the removal, deposit, and concealment of distilled spirits upon which the taxes had not been paid, and that it was in the place where such spirits were stored (R. 1–7).

In his petition for certiorari, petitioner concedes that the automobile was subject to forfeiture if the evidence on which it was forfeited was legally obtained. Petitioner moved to suppress all evidence obtained by a United States probation officer, Willard M. Fansler, at the time he seized the car and illicit liquor. Prior to hearing the forfeiture case, the court had had a hearing on revocation of petitioner's probation, had revoked probation, and imposed a sentence of two years and a fine of $250 (R. 17–18). The evidence on the probation hearing was included in the forfeiture case by stipulation (R. 18). The facts in connection with the seizure are as follows:

On July 7, 1947, petitioner had been placed on probation for three years by the District Court after pleading guilty to violation of the federal

liquor laws (R. 1, 30).[1] For more than one year, Fansler, the probation officer, charged with supervision of petitioner (R. 1–2), had had reason to believe that petitioner was engaging in illegal liquor transactions (R. 14, 15, 23–26).

On the night of January 19, 1950, at about 9:30, Fansler, who was then watching petitioner's activities regularly, saw petitioner's other car, a 1950 Ford, and Cauley's car parked at petitioner's premises, but he did not see petitioner's 1940 Ford coupe, and he "presumed [petitioner] had gone to haul a load of whiskey." Fansler returned at about 11:00 or 11:30 p. m. and concealed himself across the street from petitioner's house, where he remained until about 5:45 the next morning (R. 8). At that time petitioner drove up and Fansler, still concealed off petitioner's premises, saw petitioner and Cauley drive into the garage in the 1940 Ford coupe. It was heavily loaded.[2] Petitioner put out the car lights and he and Cauley used flashlights. Cauley then closed the garage door. Fansler, still off the premises, heard a thud which he believed to be caused by the trapdoor in the garage, which he had observed when he was in the garage on an earlier occasion

[1] This was petitioners' third conviction in the District Court for violation of the federal liquor laws, he having served a sentence of 30 months imposed in 1939 and a sentence of six months imposed in 1942 (R. 17, 31).

[2] The car was equipped with a heavy-load spring and was weighed down from a normal position 8 to 10 inches above the tires to a point "pretty well on the tires" (R. 9).

with petitioner. He also heard the springs on the automobile "screech, as though the weight were being taken off the car" and "heard some articles being slid across the floor." He then walked to the front door of the garage (R. 10–11).[3] However, upon reaching the garage door, and before opening it, he listened for two or three minutes and heard petitioner say that "somebody should have come and picked up the stuff," which Fansler "took it for granted" meant whiskey (R. 18). He also heard someone going up and down the steps in the trap (R. 18, 19). Thereupon, Fansler opened the door, without knocking, and, as he testified (R. 18–19):

> * * * rolled the one garage door back and turned my flashlight into the garage. [Petitioner] was sitting back in the rear compartment of this 1940 coupe. Cauley was going downstairs with a case of whisky. I turned my flashlight into the car and there were seven, or eight or nine cases of whisky in the car. There were two or three cases on the floor and the remainder of the 26 cases were in the trap. I called to Cauley and told him to come up out of the trap and we talked a few minutes and I told him we would load it all back on; that we would have to turn it in. So we loaded the full 26 cases of

[3] In going to the garage, Fansler proceeded along the edge of the lot and was not certain whether he was "at all times on [petitioner's] property or on the adjoining property" (R. 20).

> whisky back on the 1940 Ford coupe, and I asked them if they would appear the next morning and they said they would, and I proceeded on to Mr. Howland's with the car and reported the seizure.[4]

The only express statement of his purpose appears in the following cross-examination (R. 20):

> Q. You came there for the purpose of seeing what was in the car?
>
> A. Primarily, yes, sir, and to talk to Mr. Martin.

Upon the conclusion of the testimony the court denied the motion to suppress the evidence and entered judgment forfeiting the automobile (R. 5–7). The judgment was affirmed by the Court of Appeals for the Fourth Circuit (R. 35).

ARGUMENT

The Court of Appeals correctly held that this case is governed by *United States* v. *Rabinowitz*, 339 U. S. 56. In that case this Court reiterated the established rule that the reasonableness of a search and seizure depends upon all the facts and circumstances (p. 66). It held, contrary to the contention that a search warrant is indispensable when advance opportunity to obtain one is available, that such a warrant is not a *sine qua non* to the reasonableness of a search and seizure incident to arrest (p. 65). The right to search for

[4] Mr. Howland's official position does not appear in the record. The Court of Appeals states that the automobile was delivered to "the federal authorities" (R. 32).

and seize, at the place of arrest, the "things connected with the crime as its fruits or as the means by which it was committed" was held to be derived not only from the authority to search the person, "but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest" (p. 61).

Petitioner attempts to distinguish the instant case from *United States* v. *Rabinowitz* on the ground that here no arrest took place. The distinction is sought to be established primarily on the ground that Fansler did not take and retain physical custody of petitioner but only required him to appear the next morning. This fact cannot properly be evaluated separately from the totality of the facts bearing upon the question whether an arrest was made, including the authority to arrest and the probability of intent to arrest. Fansler was a probation officer charged with supervision over petitioner and as such he was specifically authorized to arrest petitioner without a warrant (18 U. S. C. 3653). Fansler had had a long period of acquaintance with petitioner's repeated violations of liquor law, including the techniques of those violations. Petitioner had himself admitted to Fansler that he had hidden liquor in the same garage that Fansler was watching on the night of the arrest and seizure (R. 23). On the night of the seizure, before leaving his place of concealment across the road from petitioner's premises, he had seen peti-

tioner drive into the garage with Cauley, whom he suspected as a result of his prior observations was engaged in illicit liquor traffic with petitioner. He had seen that the car was on that occasion equipped with a heavy-load spring and that it was heavily loaded. The car lights were switched off in the garage and flashlights were substituted. After the closing of the garage door, Fansler heard a thud apparently caused by the opening of the trap door in the garage, the screech of the car springs, and the sound of heavy objects being dragged across the floor of the garage.

As stated, all of these circumstances were known to Fansler before he went to the garage door. We submit that they constituted, without more, probable cause for arresting petitioner. But there was more. After reaching the door,[5] and before opening it, Fansler heard petitioner say that somebody should have come and "picked up the stuff," which Fansler justifiably inferred meant whiskey. He also heard someone making trips up and down the steps in the trap. His observations at that point, if not before, were convincing that petitioner and Cauley were actually unloading illicit liquor in the garage and that they expected someone to come for it. He was

[5] It is not clear from the record whether Fansler walked on petitioner's lot or on the adjoining lot in going to the door of the garage (see R. 20). In any event, this traversing of the open ground was no such physical breaking in as was criticized in *McDonald* v. *United States*, 335 U. S. 451, 458, which is cited as supporting the petition (Pet. 17).

therefore justified in entering the garage to arrest petitioner for the felony which was then being committed and which, by the same token, constituted a violation of petitioner's probation.

In the light of these circumstances, we think it is clear that Fansler's entry into the garage was justified for the purpose of arresting petitioner. Petitioner argues, however, that this was not the purpose of the entry and he relies upon Fansler's answer to a question on cross-examination (R. 20) that he went to the garage "primarily" to see what was in the car "and to talk to" petitioner (Pet. 16). As we read this testimony in the context of the whole record, Fansler meant simply that he wished to confirm the fact he had already perceived through his senses, *i. e.*, that petitioner had brought in a load of liquor that night. The fact that he intended to see "what was in the car" does not invalidate what was otherwise a lawful arrest upon probable cause and a lawful seizure as an incident of the arrest. Cf. *United States* v. *Rabinowitz,* 339 U. S. at 60.

The fact that Fansler did not retain physical custody of petitioner after the events in the garage, upon which petitioner so heavily relies in attempting to distinguish this case from the rule of the *Rabinowitz* case, is unimportant. Petitioner was subject to Fansler's authority as a probation officer and he submitted to that authority by agreeing to appear the next morning. This constituted an arrest, even though there was

no actual taking or manual touching of petitioner's person.[6] Moreover, as the Court of Appeals pointed out (R. 34), any doubt as to whether there was an arrest "within the technical meaning of that term" would not impair the applicability of the rationale of the *Rabinowitz* decision. For, as the Court of Appeals stated, "it

[6] Section 41 (2) of the *Restatement of Torts* (1934) states:

> The custody is complete if the person against whom and in whose presence the authority is asserted, believes it to be valid or is in doubt as to its validity and *submits thereto.* [Italics supplied.]

Comment b. to this section states:

> *Submission to asserted legal authority.* It is not necessary that the person asserting an authority shall physically touch the other or take him under his physical control or that submission to the custody be procured by threats or be induced by fear of physical compulsion. * * *

Comment c. states:

> *Submission, how shown.* The submission necessary to convert the assertion of authority into a custody taken thereunder may be shown by words or conduct. Submission by words may be shown by any language which expresses the other's recognition of the validity of the authority and his willingness to submit to custody. Submission by conduct may be shown by any act or omission indicating the other's recognition that he is within the custody and power of the person asserting the authority although no physical force is exerted or threatened, or by doing or refraining from doing any act which such person commands him to do as a condition for his release from the custody taken under the asserted authority.

See also *Morton* v. *United States*, 147 F. 2d 28 (C. A. D. C.), certiorari denied, 324 U. S. 875.

can hardly be maintained that the search was unreasonable, solely because the officer exercised his discretion to notify the probationer to appear rather than detain him physically at the time of the seizure of the car" (R. 34).

No other grounds for distinguishing the *Rabinowitz* case appear. We find no valid basis of distinction in the fact that in the *Rabinowitz* case a warrant of arrest had been obtained, whereas here the officer acted pursuant to specific statutory authority to arrest without a warrant, upon the basis of what he had seen and heard. See *United States* v. *Rabinowitz,* 339 U. S. 56, at 60; *Marron* v. *United States,* 275 U. S. 192, 198–199; *Cradle* v. *United States,* 178 F. 2d 962 (C. A. D. C.), certiorari denied, 339 U. S. 929; *Newyahr* v. *United States,* 177 F. 2d 658 (C. A. D. C.), certiorari denied, 338 U. S. 936.

In several aspects the legality of the seizure is even clearer in this case than in the *Rabinowitz* case. Here, there was no "search" in the ordinary sense of the word. All that occurred was the seizure of the visible instruments and fruits of the crime at the scene of the arrest. This has been distinguished from a searching out of evidence by hunting through a person's premises. See dissenting opinion, *United States* v. *Rabinowitz,* 339 U. S. 36, at 75. Moreover, the principal article seized, and which was the object of forfeiture, was an automobile which could be

quickly moved out of the locality or jurisdiction in which the warrant must be sought. *Carroll* v. *United States,* 267 U. S. 132, 153; *Brinegar* v. *United States,* 338 U. S. 160.

CONCLUSION

The decision below is correct and involves no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
J. F. BISHOP,
Attorneys.

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